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In the Supreme Court of the United States

OCTOBER TERM, 1989

RANDY HEARN, et al.,
Petitioners,

vs.

THE CITY OF OVERLAND PARK, KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

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QUESTION PRESENTED

The narrow question presented is whether the City of Overland Park ordinance restricting the ownership and possession of "pit bull dogs" is unconstitutionally vague for lack of a core meaning; the broader question is whether state and local governments may adopt and enforce penal laws aimed at certain canine "breeds" without defining the targeted "breeds" or specifying the standards (or methods of evaluation) to be used in deciding which animals are encompassed by the law.

PARTIES BELOW

Petitioners are dog owners and residents of Johnson County, Kansas, which encompasses the City of Overland Park; Respondent is the City of Overland Park, Kansas.

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THE CITY OF OVERLAND PARK, KANSAS,
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PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

Petitioners request the Court to issue a writ of certiorari to review the Kansas Supreme Court opinion dated April 14, 1989 (Appendix Exhibit I), affirming the constitutionality of a challenged municipal "pit bull" ordinance (Appendix Exhibit II). The basis for seeking review is that the Kansas Supreme Court has decided an issue being litigated throughout the country which involves an important Federal constitutional question which ought to be addressed and resolved by this Court. The Kansas Supreme Court's decision also conflicts with the pertinent decisions of this Court applying the vagueness doctrine to similar statutes and ordinances. In addition, the Kansas Supreme Court decision arguably conflicts with the views expressed (in *obiter dictum*) by the Massachusetts Supreme Court in *American Dog Owners Association, Inc. v. City of Lynn, Mass.*, 533 N.E.2d 642 (Mass. 1989).

OPINION BELOW

The Opinion of the Kansas Supreme Court is included in the Appendix as Exhibit I.

JURISDICTION

The Kansas Supreme Court Decision is dated April 14, 1989. Petitioners (plaintiffs/appellants below) timely moved for rehearing and that motion was denied by the Kansas Supreme Court June 9, 1989. The jurisdiction of this Court is invoked under Supreme Court Rule 17.1(c) and (b).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

1. The Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

2. Overland Park Ordinance DAC-1442, as amended, which is reproduced in the Appendix as Composite Appendix Exhibit II.

STATEMENT OF THE CASE

On September 21, 1987 the City of Overland Park adopted Ordinance DAC-1442 (Appendix Exhibit II) which stated that "pit bull dogs" were henceforth deemed "Dangerous Animals" under the city code (in the same class as tigers, crocodiles, and cobras) and that their ownership and possession would be subject to various restrictions.[1] Like many similar "pit bull" ordinances and statutes which have swept through the United States in recent years, the Overland Park ordinance was largely a political reaction to press reports attributing vicious propensities to dogs which the press describes as "pit bulls." While most such ordinances have at least attempted to *describe* the dogs being restricted, e.g. by providing for the incorporation of the descriptive "breed standards" promulgated by the national dog associations (the United Kennel Club ("UKC") and American Kennel Club ("AKC")), the Overland Park ordinance "defines" the target of the legislation (the "pit bull dog") solely as follows:

"any and all of the following dogs:

(a) the Staffordshire Bull Terrier breed of dogs;

(b) the American Staffordshire Terrier breed of dogs;

(c) The American Pit Bull Terrier breed of dogs;

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1. The restrictions were (*inter alia*) that the animals be kept indoors or restrained and muzzled at all times, that warning signs be posted on the property, and that owners acquire a $50,000 liability insurance policy. The ordinance provided for the outright banishment from the city of any dog whose owner failed to comply with the restrictions. The ordinance is also enforced through criminal sanctions, including substantial fines and up to 30 days imprisonment (Appendix Exhibit II at Section III).

(d) Dogs which have the **appearance and characteristics of being predominately of the breeds of dogs** known as Staffordshire Bull Terrier, American Pit Bull Terrier, [or] American Staffordshire Terrier."

(Kansas Supreme Court opinion at page 2; emphasis supplied)

As acknowledged by the Kansas Supreme Court, therefore, the ordinance purports to restrict the ownership and possession of any canine (including all common mutts, mongrels and mixed-breed dogs) which a police officer decides has the "predominant characteristics" of either of the three named "breeds." None of the key terms of the ordinance ("characteristics," "breed," "Staffordshire Bull Terrier," "American Pit Bull Terrier," and "American Staffordshire Terrier") is anywhere defined or described; the ordinance does not provide *any* definition or description of the types of dogs whose "predominant characteristics" are targeted by the law, nor does it define *what type* of perceived "characteristics" determine a dog's "predominant breed," either as an element of, or in contradistinction to, its appearance.

Not only does the ordinance lack a rudimentary description or definition of the targeted animals, it also fails to provide any *standard* or methodology for making the required distinctions between those animals which are encompassed by the ordinance and those which are not.[2]

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2. The city police chief, presumably seeking to cure the latter deficiency, adopted "Standard Operating Procedures" ("SOPs") which, among other things, provided the circular direction that police officers were to decide if a dog had the "predominant characteristics" of a targeted "breed" by using the officer's personal experience to judge the animal's "predominant characteristics." (Appendix Exhibit III). The chief also directed that "other" factors could be considered but did not

(Continued on following page)

As this Court can see from its own reading of the Overland Park ordinance and "SOPs," the city council and police chief were thus quite generous in their delegation of unleashed discretion to individual police officers to decide not merely which dogs (and, therefore, which dog owners) were encompassed by the ordinance, but even in allowing them to decide *how to go about deciding* which dogs and dog owners were encompassed by the ordinance.

Petitioners sued in the state trial court to enjoin enforcement of the ordinance, challenging it primarily on vagueness grounds. The trial court upheld the ordinance and its decision was subsequently affirmed by the Kansas Supreme Court.

As the Court will see in the Argument section below, petitioners' position is that the ordinance on its face lacks even a rudimentary core meaning.[3] If petitioners are correct, then it does not really matter whether some witnesses testified that they or others would be able to use unarticulated standards of evaluation to identify the "predominant characteristics" of dogs, even to the point of distinguishing a "49%" bulldog or boxer from a "51%" American Pit Bull Terrier. While it is therefore unneces-

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Footnote continued—

specify what those "other" factors might be. Remarkably, the police chief did *not* include as a possible basis for identifying a suspected "pit bull" information about the actual ancestry or parentage of the dog, nor did he refer to the descriptive breed standards promulgated by the UKC and AKC which contain a detailed (if highly vague and ambiguous) "laundry list" of physiological traits for the breeds listed in the ordinance.

3. Petitioners assert that the Court may determine for itself that the core language of the ordinance is unconstitutionally vague for failure to define its key terms or state *how one is to go about* defining those terms, i.e., identifying the standards of evaluation to use in deciding which animals and animal owners are subject to the ordinance.

sary to describe the trial testimony in elaborate detail, a brief synopsis of that testimony will nevertheless be helpful to the Court because it proves petitioners' theoretical point that the Ordinance lacks *objective standards* of enforcement or compliance.

Dr. I. Lehr Brisbin testified as an expert witness for the plaintiffs.[4] Dr. Brisbin testified that even with his advanced degrees and expertise and long experience in animal identification and taxonomy, *he* could neither comply with nor enforce the Overland Park ordinance. Dr. Brisbin explained that in the case of dogs, a "breed" refers only to the dog's registration with the UKC or AKC, which registration is based on the animal's pedigree (parentage) (TT 52-53). Dr. Brisbin testified that there is no way to determine the "breed" of a particular dog aside from the UKC or AKC registries, for there is nothing in the appearance of a dog which determines its gene pool. Dr. Brisbin also noted that mixed-breed dogs (a group which includes most dogs in the United States) frequently "look like" registry breeds they actually have no connection with, or fail to "look like" those registry breeds with which they actually share genetic material (TT 55). Dr. Brisbin confirmed that there is *no* scientific or objective way to measure or identify any particular dog as a member of a "breed," and more specifically, that there was no way to identify a dog as "predominately" "American Pit Bull Terrier" or "predominately" any other of the named "breeds," which "breeds" have only recently been recognized and are

4. Dr. Brisbin holds advanced science degrees, including a Ph.D. in zoology, and has over 30 years experience in animal behavior and taxonomy and anatomy. Dr. Brisbin has been accepted as an expert witness in numerous animal behavior and identification cases (Trial Transcript 43-50). Dr. Brisbin is also intimately familiar with the "breed standards" of the UKC and AKC for all three of the named dog "breeds." (TT 51).

therefore particularly miscellaneous in appearance (TT 65-70, 152, 154, 156, 157; see footnote 8, *infra*).

Dr. Brisbin further testified that he had discussed the concept of "predominant appearance and characteristics" with numerous animal control officers and hundreds of dog owners, and had discovered that no one agreed with each other about the correct or ideal "appearance" of the "breeds" named in the ordinance (TT 56-57).

Fred Miller, the President of the United Kennel Club, also testified for the plaintiffs. Mr. Miller, who has 50 years experience with registered dogs (TT 233-34) and is indeed responsible for determining both the breed names and physiological "standards" of the breeds (TT 233-35), confirmed that he could neither enforce nor comply with the Overland Park ordinance. Mr. Miller noted that the UKC and AKC breed standards themselves revealed the complete diversity of physical traits within the three breeds named in the ordinance; permitting, for example, a dog of *any color* or combination of colors, and *any size or weight*, to fully satisfy the "breed standards" for one or the other of the three breeds (TT 256-57). (See footnote 8, *infra*). Mr. Miller explained that for a dog to be registered with the UKC there must therefore be evidence of the dog's ancestry back for three generations (TT 258-59), and that nobody could determine a dog's predominant "breed" merely by looking at the dog. Echoing Dr. Brisbin, Mr. Miller noted that mixed-breed dogs often appear to be representatives of breeds which they have no known connection to, and that anyone's opinion about the "breeding" of a dog, based on the dog's appearance, is just that, an *opinion* which could neither be refuted nor proved (TT 239-40,

276-77). Mr. Miller also confirmed that animal control officers seldom agree in their evaluations of a dog's "breeding," especially with respect to the heterogeneous breeds identified in the ordinance (TT 240-44).

Dr. Clifford, a veterinarian, testified for the city. Even Dr. Clifford acknowledged that he did not know if citizens could determine which dogs were targeted by the ordinance, and Dr. Clifford went on to state that officers could distinguish dogs "in many instances" so long as they had special training (TT 342-343). Dr. Clifford acknowledged that the dogs referred to in the ordinance could have a wide diversity of appearances (TT 256-257, 454-456). Dr. Clifford further acknowledged that even he could err in identifying a breed of a dog based on physical characteristics alone, and that law enforcement officers could not make such identifications with a high degree of certainty. Dr. Clifford also admitted that dogs having some boxer or mastiff ancestors could readily be misidentified as one of the targeted breeds and, indeed, that he himself had made such misidentifications (TT 458-461). Proving that very point, Dr. Clifford proceeded to misidentify the "breeds" of dogs shown in photographs presented to him (TT 474-478; Volume III, page 40).[5]

Another witness for the city was officer Tracy Allen who proceeded to assert that the police chief's SOPs made it impossible to misidentify a dog (TT 578). Officer Allen then identified a Neapolitan Mastiff as a pit bull, and another non-targeted dog as subject to impoundment under the ordinance (TT 592-596).

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5. Dr. Clifford stated that a number of the dogs he was shown were encompassed by the ordinance when in fact they were known to be other, non-regulated, breeds; he also "excused" from the ordinance dogs which were in fact "pure bred" members of one or another of the targeted breeds (TT 96-97, 480, 485, 482, 483, 494).

Accordingly, while the city did produce witnesses who testified that they could identify the dogs targeted by the ordinance, their testimony actually reflected that nobody could with any reliability or confidence. More importantly, the trial transcript reflects that nobody could articulate the *standards of evaluation* which were to be used for such identification purposes, because of course the ordinance itself failed to identify what those standards might be.

The trial court nevertheless upheld the ordinance and the Kansas Supreme Court affirmed, relying substantially on Justice Potter Stewart's comment in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), that he could not define "hard core pornography" but knew it when he saw it.

REASON FOR GRANTING THE WRIT

Anti-"Pit-Bull" Laws Enforced by Penal Sanctions Are Sweeping the Country and Have Generated Dozens of Constitutional Challenges in the State and Federal Courts, With Mixed and Inconsistent Results. While It May Be Difficult for Legislative Bodies to Define a Particular Canine "Breed," Especially of New and Heterogeneous "Breeds," It Is Surely Unconstitutional for the Government to "Avoid" That Difficulty by Providing No Definition at All, Thereby Promoting Arbitrary Enforcement by the Police and Making It Impossible for Citizens to Know If They Are Encompassed by the Law.

The trial transcript and exhibits confirmed that no one can reliably or consistently determine that one dog is encompassed by the Overland Park ordinance while another is not. Much more importantly, the trial testimony and evidence confirms the self-evident if theoretical proposition that the Overland Park ordinance does not identify any *standards* for making such distinctions. As reflected by the trial testimony, there are many ways of attempting to "identify" a dog or "breed" of dog: Through the dog's registration with a private association, through the subjective opinions of the dog's owner, through behavioral tests, through the use of one of dozens of published dog books and charts, through bone and teeth measurements, through the AKC or UKC "laundry lists" of physical characteristics, through the private and unarticulated mental "image" of the observer, through knowledge of the dog's actual ancestry,

and so forth.[6] Although breed-specific legislation may be similar to restrictions on pornography in the sense that both dog "breeds" and "pornography" are very difficult to define, the critical *difference* is that the City of Overland Park simply made no effort whatever to provide a definition or a standard of evaluation.

Anti-"pit bull" laws and ordinances are now sweeping the country, and constitutional challenges on vagueness grounds have been mounted in dozens of counties and states, with inconsistent results. The challenged ordinances all suffer from vagueness problems but this ordinance is among the very worst offenders of the specificity requirement because it does not even attempt to offer a *standard* for the police or dog owners to use when trying to *determine* whether a particular dog is subject to the ordinance. The Overland Park ordinance thus lacks even a rudimentary core of meaning, unlike (for example) other "pit bull" ordinances which at least attempted to describe the targeted animals by incorporating the AKC or UKC "breed standards."[7]

It is especially important for this Court to grant the requested writ because of the number of ordinances and

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6. Petitioners do not concede that each of these identification methods would, standing alone, avoid the vagueness problem. For example, the AKC and UKC breed standards are themselves extremely vague, and indeed, in an unreported decision, one federal judge declared them too vague to support such an ordinance. *Responsible Dog Owners of Florida, Inc. v. Board of County Commissioners of Broward County*, Case No. 85-6743 (S.D. Fla., October 11, 1985). However, a legislative definition of the targeted dogs could readily provide the required degree of specificity, provided the legislative body can agree on a set of physical or other objective traits (e.g., parentage or registration) of the dogs to be regulated.

7. For a recent reported decision which contains the UKC and AKC standards, see *State v. Peters*, 534 So.2d 760 (Fla. 3rd DCA 1988).

resulting lawsuits which have occurred in the last five years. See especially *State v. Peters, supra; ADOA v. City of Lynn*, 533 N.E.2d 642 (Mass. 1989); *Garcia v. Village of Tijeras*, 767 P.2d 355 (N.M. App. 1988) (the latter case sustaining an ordinance which totally banned certain dog breeds from the municipality); *Starkey v. Township of Chester*, 628 F. Supp. 196 (E.D. Pa. 1985); *Vanater v. Village of South Point*, ... F. Supp. ....., Lexis 7231 (W.D. Ohio Case No. C-I-87-708, June 29, 1989); *Responsible Dog Owners of Florida, Inc. v. Board of County Commissioners of Broward County*, Case No. 85-6743 (S.D. Fla., October 11, 1985) (declaring a "pit bull" ordinance unconstitutionally vague, and thereafter dismissing the suit based on the abstention doctrine). See also, "The New Breed of Municipal Dog Control Laws—Are They Constitutional?" 53 *Cinn. L. Rev.* 1067-1080, 1984. (There have in addition been *numerous* other unreported decisions by trial courts in Florida, Washington, Minnesota and California declaring anti-pit bull ordinances unconstitutional on vagueness grounds.)

Although the Massachusetts Supreme Court in *City of Lynn, supra,* was not required to rule directly on the vagueness question (due to an implied and unintentional repeal of the ordinance by the City which mooted the case), the court did specifically state:

> "[T]here may, indeed, be some dogs which, because of registration, known parentage or close conformance in appearance to commonly accepted standards representative of 'Pit Bulls' would be 'commonly understood' to be 'Pit Bulls.' The evidence . . . indicated, however, that some dogs might appear to be 'Pit Bulls' yet belong to a breed 'commonly understood' *not* to be 'Pit Bulls,' and that some dogs 'commonly understood' by the owner or the dog registry to *be* a breed

'known as Pit Bull' might not *appear* to be 'Pit Bulls,' and so escape the notice and enforcement of the Lynn dog officers.

* * *

Unlike an ordinance which generally prohibits the keeping of a 'vicious dog,' enforcement of which involves questions of fact whether the particular dog is vicious or known by its owner to be vicious . . . [this] ordinance depends for enforcement on the subjective understanding of dog officers of the appearance of an ill-defined 'breed,' leaves dog owners to guess at what conduct or dog 'look' is prohibited, and requires 'proof' of a dog's 'type' which, unless the dog is registered, may be impossible to furnish. Such a law gives unleashed discretion to the dog officers charged with its enforcement, and clearly relies on their subjective speculation whether a dog's physical characteristics make it what is 'commonly understood' to be a 'Pit Bull'."

(*Id.*, at 646-47)

The vagueness doctrine is of course a venerable one which invalidates laws if persons of common intelligence must necessarily guess at their meaning and differ as to their application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine protects against two evils: first, it requires the government to give persons of ordinary intelligence fair warning that certain conduct is forbidden, *U.S. v. Harriss*, 347 U.S. 612, 617 (1954), a requirement fundamental to our concept of constitutional liberty. *Marks v. United States*, 430 U.S. 188, 191 (1977); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1938). Second,

the vagueness doctrine is meant to prevent arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

As this Court has stated, vague laws offend several important values. First, because man is assumed free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if discriminatory law enforcement is to be prevented, *laws must provide explicit standards for those who apply them.* A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Thus the *principal purpose* of the doctrine is to require that legislation "establish minimal guidelines to govern law enforcement." *Id.* The Overland Park ordinance does not establish minimal guidelines; it does not establish any guidelines at all.

Because no first amendment rights are involved in the ownership of a dog, petitioners must demonstrate that the ordinance is impermissibly vague in all its applications. See *United States v. Powell*, 423 U.S. 87 (1975); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). However, this case does not involve an ordinance which contains an "imprecise" standard, but rather one containing no standards at all. *Coats v. City of Cincinnati*, 402 U.S. 611 (1971). There is simply no core of meaning or identified standard of evaluation in the Overland Park ordinance for citizens or the police to use in determining whether a particular dog has the "predominant" characteristics of the named yet utterly undefined

"breeds." In this case, unlike many of the other cases (either sustaining or invalidating pit bull ordinances), the city's police officers have been afforded uninhibited discretion not only to determine which individual dogs (and dog owners) are subject to the ordinance, but more outrageously, even to decide *how they go about making such determinations.* Under the Overland Park ordinance the police in some cases may apply the ordinance to a particular dog because *they* decide to evaluate the dog under the AKC or UKC breed standards (which are themselves extremely vague); in other cases the police may include or exclude a particular dog based on their *own* unarticulated mental picture of what the targeted breeds "ought to look like," or based on private photographs which *they* carry in their wallets; in other cases, they may confiscate a dog or arrest its owner based on information concerning the dog's suspected parentage (perhaps unknown even to the owner), or based on statements in one or another dog book or manual. (Indeed, as noted by the U.S. District Court in *Vanater, supra,* "pit bulls" are even thought to have distinctive *behavioral* traits, including supposed climbing, hanging, and weight-pulling abilities. Such supposed *behavioral* characteristics offer still another possible basis for ideosyncratic decision-making by the police.) Likewise, for the vast majority of dog owners whose dogs are of mixed or unknown ancestry, it is obviously impossible for *them* to determine whether their pets are subject to the ordinance, and even more importantly, it is impossible for them to determine *how to go about* determining whether their pets are subject to the ordinance. Since the ordinance does not spell out *how* the police are to distinguish dogs, and since at least a half-dozen different methodologies are possible, every police decision is fundamentally

unpredictable. Quite simply, no *rule of law* is possible under the Overland Park ordinance because *every* enforcement decision can be based on a unique set of evaluations and standards.

Accordingly, this case raises vagueness issues even more fundamental than the underlying problem of identifying a particular dog "breed" based on subjective aesthetic characteristics, which is itself a troublesome task similar to the task of identifying "hard core pornography."[8] The latter problem may at least be ameliorated by the government specifying *some* definition or standard for making the critical distinctions. The City is surely required to provide *some* definition of what is forbidden, or at least to identify where such a defini-

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8. Indeed, this Court once noted the difficulty in determining the breed of a dog, see *Sentell v. New Orleans and Carrollton RR Company*, 166 U.S. 698, 701 (1897). As the Florida appellate court noted in *State of Florida v. Peters, supra*, "pit bulls" are particularly difficult to distinguish because the breed is new and relatively "wide open." (534 So.2d at 768). See "Efforts to Ban Pit Bulls Spark Arguments Over Residents' Safety and Civil Liberties," *Wall Street Journal*, July 6, 1987 at page 13. ("[P]it bull is a generic term that applies to the American Pit Bull Terrier, the American Staffordshire Terrier, and such mixed breeds as the Staffordshire bull terrier and the venerable bulldog."); Hearne, "Lo, Hear the Gentle Pit Bull!," *Harper's*, June, 1985, at 59, 60-61 (noting the confusion over what is a pit bull). The fundamental source of difficulty is that respondent's "breed" construct is a non-scientific, indeed anti-scientific, taxonomic classification which only proves Kant's warning that concepts without percepts are meaningless. *Unlike* tigers, crocodiles and cobras, which are scientifically defined, all dogs targeted by the Ordinance can and do "breed" with all other dogs, and so by definition are members of a single species (nor do the targeted "breeds" constitute a *subspecies*, which are based on geographic variation; See, Stephen Jay Gould, The Flamingo's Smile, Chapter 12 (Ontario, 1985)). Since there is no existing taxonomic method of identifying the targeted "breeds," the Kansas Supreme Court was quite correct to analogize the case to those involving obscenity, but the court overlooked the obvious fact that all valid obscenity laws must provide an intelligible definition of obscenity, in order that citizens and police can distinguish the obscene from the merely pornographic.

tion is to be found, but the Overland Park ordinance contains no definition whatever and no means of finding a definition elsewhere. *Winters v. New York,* 333 U.S. 507, 510 (1948).

Perhaps an apt analogy to the Overland Park ordinance would be the enactment of an ordinance restricting the display of works of art which were "Predominantly Abstract," or music which was "Predominantly Polka," or (to eliminate the unwanted First Amendment issue) zoning out restaurants with menus "Predominantly Haute Cuisine." If challenged, the government in each such case could assuredly locate professors, critics, and gastrophiles to testify, quite sincerely, that they could definitively identify each of the restricted subjects. As in the instant case such testimony would only underscore the underlying problem, for laws can not be based on opinions concerning the characteristics of different types of art or music (or dogs), without some preliminary agreement on the definition of the critical terms. (The government might provide, for example, that any music containing an accordion is *ipso facto* "Predominantly Polka," a definition which may be overbroad but at least is intelligible). Likewise, Overland Park could have defined the targeted dogs by listing their traits in terms of weight, size, color or other objective characteristics, or by identifying the extra-legislative source of such definition. In fact, however, the Overland Park council sought to regulate an animal called a "pit bull," which has no more intrinsic definition than Abstract art or polka but, realizing the difficulty in definition, perversely decided to "solve" the definitional problem by having no definition at all, thereby allowing every decision to be an *ad hoc* one. The Overland Park "pit bull" ordinance is thus akin to the hypothetical ordinance regulating Modern Art "defining" Modern art to mean art

> "which has the appearance and characteristics of being predominately of the schools of art known as abstract art, expressionist art, or impressionist art"

and leaving all further questions of definition to the individual police officer and the artistic taste of the jury.

The Court should also note that the Overland Park ordinance contains no *mens rea* requirement, which might partly ameliorate the vagueness problem. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), in which the Court placed considerable emphasis upon the absence of a *mens rea* requirement as a reason for holding a law unconstitutionally vague. Similarly in *Hoffman Estates v. Flipside, supra*, at 499, the Court held that a *mens rea* requirement mitigates a law's vagueness. See also, *Papachristou v. City of Jacksonville, supra*, at 162-163, in which the Court noted that the average householder could not possibly know the intended meaning of the words in the Jacksonville vagrancy ordinance, "nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act."

Finally, the Court should note that no great judicial deference is required in this case. Local governments already have abundant *unenforced* laws designed to control vicious dogs, based on relatively objective standards of behavior, as well as laws prohibiting free-roaming dogs. Those laws are seldom if ever enforced, for budgetary reasons, thus permitting dog attacks to occur. "Pit bull" ordinances are merely political devices for *appearing* to deal with a problem which in fact is readily controlled simply by the hiring of a few additional animal control officers and the enforcement of existing leash laws, without *any* of the constitutional infirmities of the Overland Park ordinance. At the same time, while the possession

of a dog may not have special constitutional protection, the threatened banishment of a family pet certainly encroaches upon privacy interests, personal freedoms, and family rights which ought to transcend in importance the regulation of mere "property" rights. Given the fact that man and dog have maintained such a close association over hundreds of thousands of years, and have indeed evolved as they have in part because of that association, it would certainly be a strange jurisprudence for the family dog to be relegated to the status of *mere* property, lower even in rank than firearms and lewd photographs.

CONCLUSION

The Court should grant the petition for writ of certiorari to the Kansas Supreme Court and, after full argument on the merits, should rule that the Overland Park "pit bull" ordinance is unconstitutionally vague.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing petition for writ of certiorari were furnished by mail and one was hand-delivered to Michael R. Santos, Assistant City Attorney, 8500 Santa Fe Drive, Overland Park, Kansas 66212 on this 6th day of September, 1989.

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APPENDIX

APPENDIX I

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

No. 62,045

RANDY L. HEARN, *et al.*,
Appellants,

v.

THE CITY OF OVERLAND PARK, KANSAS,
Appellee.

SYLLABUS BY THE COURT

In an action to enjoin the City of Overland Park from enforcing an ordinance regulating the ownership of pit bull dogs within the city, the record is examined and it is *held*: (1) The ordinance is not unconstitutionally vague or overbroad; (2) the ordinance does not violate the due process rights of plaintiffs under the United States and Kansas Constitutions; (3) the ordinance does not violate the equal protection clauses of the United States and Kansas Constitutions; and (4) the district court did not err in dismissing the plaintiffs' claim for damages pursuant to 42 U.S.C. § 1983 (1982).

Appeal from Johnson district court; JANETTE SHELDON, judge. Opinion filed April 14, 1989. Affirmed.

Daniel R. Jones, of Christen, deVries & Pigeon, of Kansas City, Missouri, argued the cause, and *Judith K. Macy,* of Law Offices of Michael W. Laster, of Overland Park, was with him on the briefs for appellants.

Michael R. Santos, assistant city attorney, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

ALLEGRUCCI, J.: The plaintiffs seek to enjoin the City of Overland Park from enforcing an ordinance regulating the ownership of pit bulls within the city. The plaintiffs are thirteen residents of Johnson County, Kansas, who own dogs kept within the City of Overland Park, Kansas. In their petition filed with the district court, the plaintiffs contended that the ordinance was unconstitutionally vague and overbroad, and violated their rights to due process and equal protection of the laws. The petition also included a claim for damages pursuant to 42 U.S.C. § 1983 (1982). The district court upheld the constitutionality of the ordinance, and found it to be a valid and enforceable exercise of the city's police power. The plaintiffs now appeal.

On September 21, 1987, the Overland Park city council adopted an ordinance defining the "pit bull dog" as a "dangerous animal," within the meaning of Overland Park Municipal Code Ch. 6.10. As subsequently amended, the ordinance defines a "pit bull dog" as

"any and all of the following dogs:

"(a) the Staffordshire Bull Terrier breed of dogs;

"(b) the American Staffordshire Terrier breed of dogs;

"(c) the American Pit Bull Terrier breed of dogs;

> "(d) Dogs which have the appearance and characteristics of being predominantly of the breeds of dogs known as Staffordshire Bull Terrier, American Pit Bull Terrier, [or] American Staffordshire Terrier.
>
> "The registration of a dog at any time as a pit bull or any of the dogs listed above shall constitute prima facie evidence the animal is prohibited by this section."

Other sections of the ordinance require the owner of a pit bull dog to restrain the animal indoors or to a confined kennel. If the animal is removed from this environment, it must be secured by a leash and muzzle. The owner is required to prominently display a "Beware of Dog" sign on the premises. The owner is also required to purchase $50,000 in single-incident liability insurance, to compensate for any damage caused by the animal.

The plaintiffs contend that the district court erred in concluding that the ordinance was not impermissibly vague and also in concluding that the plaintiffs had no standing to raise a claim of vagueness. We must, therefore, first determine if the plaintiffs had standing to raise vagueness. The district court found that nine of the plaintiffs had identified their animals as pit bull dogs, and have registered them as such animals with the City of Overland Park, Kansas. As to plaintiffs Barbara LeClerq Boran and William O. Mitchum, the court found that they "at one time registered their dogs as 'pit bulls' with the City of Overland Park, but have since that time had their dogs reidentified by a licensed veterinarian as another breed mix, and as such have no standing in this lawsuit." Finally, the district court found that two plaintiffs, Myrtle LeClerq and Maxine Mitchum, had failed to establish that they owned animals separate and distinct from those owned by Barbara Boran and William Mitchum.

The district court correctly found that nine plaintiffs did not possess standing to raise the present vagueness argument. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy,* 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). Having acknowledged that their animals are pit bull dogs, these plaintiffs cannot complain of the allegedly vague nature of the ordinance. However, such is not the case with regard to the four remaining plaintiffs, William O. Mitchum, Maxine Mitchum, Barbara LeClerq Boran, and Myrtle LeClerq.

That the animals owned by these plaintiffs may once have been registered as pit bull dogs, but subsequently have been reidentified as other breeds, does not establish that they do not fall within the scope of the challenged ordinance. Although identified as another breed, the animals may still fall within Subsection (d) of the portion of the ordinance defining pit bull dogs. Subsection (d) defines as a pit bull dog a dog which has "the appearance and characteristics of being predominantly" those of the other specifically designated breeds. The district court erred in finding these plaintiffs did not have standing to raise vagueness. To resolve the claims of these plaintiffs, therefore, we must turn to the substance of their vagueness claim.

In considering the issues raised in the present appeal, it is necessary to keep in mind the rules relating to the review of the constitutionality of legislation. This court presumes that the challenged legislation is constitutional. All doubts concerning the legislation must be resolved in favor of its validity. Before the legislation may be stricken down, it must clearly appear that it violates the Constitution. It is the duty of the court to uphold the

legislation under attack, if possible, rather than defeat it; if there is any reasonable way to construe the statute as constitutionally valid, that should be done. *Lakeside Village Improvement Dist. v. Jefferson County*, 237 Kan. 106, 113-14, 697 P.2d 1286 (1985).

With these rules in mind, we first consider plaintiffs' contention that the district court erred in finding that the city ordinance was not unconstitutionally vague.

Legislation is unconstitutionally vague when one cannot reasonably understand that his contemplated conduct is within the scope of that proscribed by the legislation. See *United States v. Harriss*, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954).

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

However, "ultimate, god-like precision" is not required by the Constitution. *Miller v. California*, 413 U.S. 15, 28, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). The Constitution "does not require impossible standards"; it is satisfied by statutory language which "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States v. Petrillo*, 332 U.S. 1, 7-8, 91 L. Ed. 1877, 67 S. Ct. 1538 (1947). That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the

language too ambiguous to define a criminal offense. *Miller v. California,* 413 U.S. at 27 n.10; *United States v. Petrillo,* 332 U.S. at 7; *Robinson v. United States,* 324 U.S. 282, 285, 286, 89 L. Ed. 944, 65 S. Ct. 666 (1945); see *United States v. Harriss,* 347 U.S. at 624 n.15.

Because of the strong presumption in favor of the constitutional validity of legislation, statutes are not " 'automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.' " *Parker v. Levy,* 417 U.S. at 757 (quoting *United States v. National Dairy Corp.,* 372 U.S. 29, 32-33, 9 L. Ed. 2d 561, 83 S. Ct. 594 [1963]). In this regard, the United States Supreme Court has noted that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. United States,* 229 U.S. 373, 377, 57 L. Ed. 1232, 33 S. Ct. 780 (1913).

It is important to note that we are not dealing with an ordinance that limits constitutionally protected conduct. Because the present ordinance does not infringe upon explicit constitutional guarantees, such as freedom of speech, the ordinance should be upheld unless it "is impermissively vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186, *reh. denied* 456 U.S. 950 (1982). The plaintiffs must establish that the ordinance is unconstitutional on its face, which means it must be demonstrated to be " 'invalid *in toto*—and therefore incapable of any valid application.' " *Hoffman Estates,* 455 U.S. at 494 n.5 (quoting *Steffel v. Thompson,* 415 U.S. 452, 474, 39 L. Ed. 2d 505, 94 S. Ct. 1209 [1974]). In order to establish that legislation is unconstitutional

on its face, the person challenging the legislation must establish that it is vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' " *Hoffman Estates,* 455 U.S. at 495 n.7 (quoting *Coates v. City of Cincinnati,* 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686 [1971]).

This court has also discussed the requirements for a due process challenge to legislation as impermissibly vague. The test to determine whether a criminal statute is unconstitutional as being vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. *State v. Rose,* 234 Kan. 1044, 1045-46, 677 P.2d 1011 (1984); *State v. Lackey,* 232 Kan. 478, 479, 657 P.2d 40 (1983); *State v. Carpenter,* 231 Kan. 235, 237, 642 P.2d 998 (1982); *State v. Huffman,* 228 Kan. 186, 192, 612 P.2d 630 (1980); *State v. Norris,* 226 Kan. 90, 91-92, 595 P.2d 1110 (1979); *Kansas City Millwright Co., Inc. v. Kalb,* 221 Kan. 658, 663, 562 P.2d 65 (1977). A statute is not invalid for vagueness or uncertainty where it uses words of commonly understood meaning. *State v. Rose,* 234 Kan. at 1046; *In re Brooks,* 228 Kan. 541, 544, 618 P.2d 814 (1980); *Kansas City Millwright,* 221 Kan. at 663. At its heart the test for vagueness is a common-sense determination of fundamental fairness. 221 Kan. at 663.

The plaintiffs contend that, owing to the inherent difficulty in identifying the "breed" of a given dog, the

city ordinance is impermissibly vague. The plaintiffs contend that the term "breed" is so imprecise that many dog owners will be uncertain whether their animal is covered by the ordinance.

We recognize the difficulty in attempting to identify a dog by breed with absolute certainty. That fact alone does not render an ordinance unconstitutionally vague. Perhaps Justice Potter Stewart articulated the dilemma best in *Jacobellis v. Ohio,* 378 U.S. 184, 197, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964):

> "I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts,* that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

The ordinance at issue identifies three specific breeds of dogs or dogs which "have the appearance and characteristics of being predominantly of" these breeds. The defendant city introduced evidence that "breed" or "phenotype" is a commonly used and understood term for the physical appearance or description of an animal. The three specific breeds of dogs listed in the city ordinance are generally similar in appearance, and may be identified by their physical characteristics.

In implementing the ordinance, the Overland Park Police Department has adopted rules for the interpretation

and implementation of the ordinance. These rules specify that the term "predominantly," in the context of subsection (d) of the ordinance.

> "shall mean that the officer has knowledge through identification procedures, admission by owner, keeper, or harborer, or otherwise that the animal is more than fifty percent pit bull. Predominantly shall further mean that the animal exhibits the physical characteristics of a pit bull more than that of any other breed of dog. If an officer cannot determine the predominant breed of the animal in question as pit bull, the animal shall not be subject to the provisions of *O.P.M.C. 6.10.020* unless the animal is later positively identified as a pit bull by a licensed veterinarian."

In its memorandum opinion, the district court stated:

> "Pit bull dogs are different from other dogs and, because they are different, they are distinguishable. Their physical features include a short, squatty body with developed chest, shoulders, and legs; a large, flat head; muscular neck and a protruding jaw. The appearance of these dogs typifies strength and athleticism. They can climb trees, they have extremely strong jaws and biting power, and they tend to clamp on to something and not let go."

The court noted that the determination of whether a dog is, or is not, a pit bull will be a matter of judgment in a few cases. However, the ordinance, as interpreted by the animal control division of the Overland Park Police Department, applies only to animals in which pit bull dog characteristics predominate. As the court noted:

> "There will be instances of mixed breed dogs where it will be difficult or perhaps even impossible to

> determine whether or not a certain dog falls under the regulations of the ordinance. However, a few questionable cases will not cause a finding of unconstitutionality of an ordinance due to vagueness."

The present ordinance is interpreted to exclude doubtful cases from the scope of its regulation and therefore does not create an impermissibly vague standard.

The New Mexico Court of Appeals upheld a similar local ordinance from a challenge for impermissive vagueness in *Garcia v. Village of Tijeras*, ... N.M. ....., 767 P.2d 355 (Ct. App. 1988). The village ordinance prohibited the ownership or possession in the village of "any dog of the breed known as American Pit Bull Terrier." ..... N.M. at ....., 767 P.2d at 356. The Court of Appeals concluded that there was sufficient evidence in the record to support the findings of the trial court.

> "The trial court found that the American Pit Bull Terrier is a recognized breed of dog readily identifiable by laymen. We understand the trial court's finding to have been that the breed can be identified by persons who are not qualified to be dog show judges. . . .
>
> . . . .
>
> "There was testimony at trial that the term 'pit bull' is the generic term for 'American Staffordshire Terrier.' There was also testimony at trial that there is no difference between the American Staffordshire Terrier and the American Pit Bull Terrier.
>
> "In addition, there was testimony that each breed of dog has a typical physical appearance termed as 'phenotype,' and that an unregistered dog can be identified as being of the breed 'American Pit Bull

> Terrier' by its physical characteristics, or phenotype. Several witnesses testified that they could recognize an American Pit Bull Terrier by its physical characteristics.
>
> "We believe this evidence supports a determination that the breed American Pit Bull Terrier is a breed of dog recognized by its physical appearance. Given our obligation to indulge every presumption in favor of constitutionality, we interpret the term 'known as' in light of the testimony at trial. Thus, we interpret the ordinance to include not only dogs that are registered, but also dogs that are recognizable, as American Pit Bull Terriers or American Staffordshire Terriers." ..... N.M. at ....., 767 P.2d at 357-58.

Similarly, in *State v. Peters,* 534 So. 2d 760 (Fla. Dist. App. 1988), the court rejected a similar vagueness challenge to a local ordinance regulating pit bull dog ownership. The Florida court concluded that the ordinance addressed itself in terms "sufficiently well understood by pit bull owners to enable them to determine whether their dogs fall within the proscription of the ordinance." The issue of whether a particular animal fell within the scope of the ordinance was therefore found to be "a matter of evidence, not constitutional law." 534 So. 2d at 768.

We agree that whether a particular dog comes within the purview of the ordinance is a question of fact to be determined by the evidence. We find, in the present case, that the decision of the district court is supported by substantial competent evidence. See *Farmers State Bank of Ingalls v. Conrardy,* 215 Kan. 334, Syl. ¶ 1, 524 P.2d 690 (1974).

The plaintiffs next contend that the city ordinance is unconstitutionally overbroad, and incorrectly treats as

dangerous animals many dogs fundamentally gentle in nature. This court discussed the concept of impermissibly overbroad statutes in *State v. Huffman,* 228 Kan. at 189:

> "While closely related, overbreadth and vagueness are distinct concepts. An overbroad statute makes conduct punishable which under some circumstances is constitutionally protected from criminal sanctions. A vague statute leaves persons of common intelligence to guess at its meaning and whether particular conduct is a crime."

The overbreadth doctrine serves to protect the rights of free expression guaranteed by the Constitution.

> "The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.' *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 634 (1980)." *New York v. Ferber,* 458 U.S. 747, 768-69, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).

The United States Supreme Court has ruled that "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin,* 467 U.S. 253, 268 n.18, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984).

In the present case, the plaintiffs' right to own pit bull dogs is not guaranteed by the First Amendment. Because the plaintiffs' activities do not fall within the scope of rights guaranteed by the First Amendment, the city ordinance may not be attacked as constitutionally overbroad.

The petition filed by the plaintiffs also contended that the city ordinance was an improper exercise of the city's police power and violated the plaintiffs' substantive due process rights. This court has discussed the permissive scope of the police power in a number of decisions. In *City of Colby v. Hurtt,* 212 Kan. 113, 117, 509 P.2d 1142 (1973), the court stated:

> "'[T]he police power may be exerted as a restraint upon private rights of persons or to regulate the use of property, and where appropriate or necessary, prohibit the use of property for certain purposes in aid of the public safety and general welfare, and constitutional limitations form no impediment to its exercise where the regulation is reasonable and bears a fair relationship to the object sought to be attained.'" (Quoting *Martin v. Davis,* 187 Kan. 473, 484, 357 P.2d 782 [1960].

Similarly, in *State ex rel. Stephan v. Lane,* 228 Kan. 379, 614 P.2d 987 (1980), the court discussed the nature of the police power and the test to be used in determining whether legislation in furtherance of the police power unconstitutionally violates substantive due process guarantees:

> "The police power is wide in its scope and gives the governmental body broad powers to enact laws to promote the health, morals, security, and welfare of the people. Broad discretion is vested in the governing body to determine for itself what is deleterious to health, morals, or is inimical to public welfare. However, the governing body does not possess plenary power to pass legislation that is arbitrary, oppressive, or so capricious that it has no

reasonable basis. *Delight Wholesale Co. v. City of Prairie Village,* 208 Kan. 246, 249-50, 491 P.2d 910 (1971).

"To justify the State's assertion of its authority in behalf of the public, it must appear that the interests of the public require such interference; that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. Debatable questions as to reasonableness are not for the courts but for the legislature. Whether the regulation imposed by the act is reasonable depends upon such things as the nature of menace against which it will protect, the magnitude of the curtailment of individual rights affected, and the availability and effectiveness of other less drastic protective measures. *Goldblatt v. Hempstead,* 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)." 228 Kan. at 392.

In *Nicchia v. New York,* 254 U.S. 228, 65 L. Ed. 235, 41 S. Ct. 103 (1920), the United States Supreme Court recognized that local governmental bodies possess broad powers to regulate the ownership and possession of dogs within the community. The Court stated that an owner's property interest in dogs "is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right." 254 U.S. at 230. Exercise of the police power for the regulation of dogs within a community for the purpose of the protection of the public "does not amount to the taking of one man's property and giving it to another nor violate principles of due process." *Johnston v. Atlanta Humane Society,* 173 Ga. App. 416, 417, 326 S.E.2d 585 (1985). The Ken-

tucky Court of Appeals recognized the "excellent qualities" of dogs' companionship, loyalty, and heroism in *Shadoan v. Barnett*, 217 Ky. 205, 210, 289 S.W. 204 (1926). Nonetheless, the court concluded:

> "[N]otwithstanding his many virtues, he also has faults, on account of which the law, as we have seen, does not accord to him the full measure of protection extended to other articles of property, leaving his status and the regulations of his existence to be fixed by the legislature as it in its wisdom sees proper in the lawful exercise of its police power. In other words, because of his sometimes vicious and destructive qualities he has been regarded and recognized by the law as only qualified property with the right in the legislature under the police power to prescribe regulations for his continued existence by either enlarging or abridging those recognized by the common law." 217 Ky. at 211.

In the present case, the district court found that pit bull dogs represented a unique hazard to the public safety, and the city ordinance regulating the ownership and possession of these dogs was therefore reasonably related to a legitimate governmental objective. The evidence introduced at trial supports this conclusion. Defendant city introduced expert testimony that pit bull dogs are both more aggressive and destructive than other dogs. Pit bull dogs possess a strongly developed "kill instinct" not shared by other breeds of dogs. This testimony indicated that pit bull dogs are unique in their "savageness and unpredictability." Research indicates that pit bull dogs are twice as likely to cause multiple injuries as other breeds of dogs.

Moreover, the injuries inflicted by pit bull dogs are far worse that those inflicted by other breeds. One witness, testifying as an expert on trauma injuries, testified that pit bull dog attacks inflicted injuries much more horrific than those in other dog attacks and were comparable, in his experience, only to those injuries inflicted in attacks by lions. The district court was also presented with a survey of 278 dog attacks indicating that a majority (54.1%) represented attacks by pit bull dogs. Of the 32 known human deaths in the United States due to dog attacks since July 1983, 23 were caused by attacks by pit bull dogs.

The district court correctly upheld the city ordinance as a valid exercise of the community's police power. The ordinance does not impermissibly infringe upon the substantive due process rights of the plaintiffs. The unique public health hazard created by the presence of pit bulls within the community justifies the city's attempt to regulate this breed of dog.

Noting the "inherent characteristics of aggression, strength, and unpredictability" of pit bull dogs, the New Mexico Court of Appeals reached a similar conclusion in *Garcia v. Village of Tijeras,* ..... N.M. at ....., 767 P.2d at 360. The Florida District Court of Appeal also agreed in *State v. Peters,* 534 So. 2d 760. The Florida court found that a local regulation requiring the purchase of a substantial amount of insurance by pit bull dog owners did not violate the owners' due process rights. Noting the "extensive power exercised by government to regulate animals," the court concluded that the insurance requirement was constitutionally permissible. 534 So. 2d at 765. Since the government possesses such broad powers to regulate animals for the public welfare, and "it is likely that

a governmental authority could ban pit bulls outright without offending the due process rights of the dog owner, a fortiori, less stringent regulations such as [the insurance requirement] would not so offend." 534 So. 2d at 765.

The plaintiffs next contend that the ordinance improperly infringes upon their right to the equal protection of the laws. They argue that the ordinance improperly singles out one breed of dog for regulation, a distinction they allege to be without a rational relationship to a legitimate governmental purpose.

> The equal protection clause
>
> " 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *State ex rel. Schneider v. Liggett,* 223 Kan. 610, 616, 576 P.2d 221 (1978) (quoting *McGowan v. Maryland,* 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 81 S. Ct. 1101 [1961]).

As long as it does not infringe upon recognized fundamental interests, or involve a suspect classification, legislation must be upheld against an equal protection challenge so long as it possesses some reasonable basis. See *State ex rel. Schneider v. Liggett,* 223 Kan. at 616-17.

> "In social and economic legislation, a statutory classification does not violate the equal protection clause merely because its classifications are imperfect. [Citations omitted.] Nor does the equal protection clause require a state 'to choose between attacking every

aspect of a problem or not attacking the problem at all.' [Citations omitted.] The foregoing principle was well stated in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578:

"'. . . This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. . . .' (p. 400.)" *Brown v. Wichita State University,* 219 Kan. 2, 13, 547 P.2d 1015 (1976).

The United States Supreme Court discussed the constitutional power of legislatures to limit or regulate the ownership of dogs in *Sentell v. New Orleans & c. Railroad Co.,* 166 U.S. 698, 41 L. Ed. 1169, 17 S. Ct. 693 (1897). The Court stated:

"While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. . . .

"[T]hey have, from time immemorial, been considered as holding their lives at the will of the legis-

lature, and properly falling within the police powers of the several States." 166 U.S. at 701-02.

This court recognized the ability of the legislature to discriminate among types of dogs in *State, ex rel., v. City of Topeka,* 36 Kan. 76, 84, 12 Pac. 310 (1886):

> "Under the almost unbroken current of authority we think that statutes and ordinances may be passed regulating, restricting, or even prohibiting the running at large of dogs in cities, and . . . that dogs in cities may be classified, and the owners, keepers or harborers thereof may be required to register all the dogs of one class and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of the dogs of another class; and . . . all this is constitutional and valid, and is 'due process of law'; and that by the same no one is denied 'the equal protection of the laws.'"

The equal protection rights of pit bull dog owners have been discussed by other courts. In *Garcia v. Village of Tijeras,* the New Mexico Court of Appeals rejected an equal protection challenge to an ordinance banning pit bulls. The court stated:

> "[W]e find that the Village's classification, whereby owners of American Pit Bull Terriers are treated differently than owners of other breeds of dog, is not violative of either due process or equal protection. Where the challenged ordinance does not trammel fundamental rights or involve a suspect classification, the court presumes the constitutionality of the discriminatory classification. . . .

> "[T]here is substantial evidence of record that American Pit Bull Terriers presented a special threat to the safety of the residents of the Village over and above that presented by other breeds of dog. A legislature or municipal governing body is entitled to address threats in a piecemeal fashion, countering each threat as it arises. [Citation omitted.] To satisfy equal protection tenets, it is not necessary that the Village address all potential threats from all breeds of dog; instead, the Village was entitled to address a phase of the problem that was of acute concern." ..... N.M. at ....., 767 P.2d at 360-61.

The United States District Court for the Eastern District of Pennsylvania also rejected an equal protection challenge to an ordinance regulating the keeping of pit bulls in *Starkey v. Chester Tp.*, 628 F. Supp. 196 (E.D. Pa. 1986). The court stated:

> "The Township could reasonably determine, as it did, that Pit Bulls are dangerous. The Township's Health Officer testified that the regulation was necessary in this densely populated Township; the Pit Bull bites to kill without signal. The Township does not have to regulate every dangerous animal at the same time in the same way to pass constitutional muster." 628 F. Supp. at 197.

State v. Peters, 534 So. 2d 760, also involved an equal protection challenge to an ordinance regulating the ownership of pit bull dogs. The court found that the local government "had no obligation to regulate *all* dogs when it regulated *some* dogs," 534 So. 2d at 764, since the government was not required to regulate all dogs at once. The court, quoting *Williamson v. Lee Optical*

Co., 348 U.S. 483, 489, 99 L. Ed. 2d 563, 75 S. Ct. 461 (1955), stated:

> " 'The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.' " 534 So. 2d at 763.

The local government was not required to regulate all potentially dangerous dogs. The sole issue, therefore, was whether there was a rational basis for regulating pit bull dogs. The *Peters* court found that there was, noting the "ample evidence" to support the city's conclusion that pit bull dogs required regulation. 534 So. 2d at 764.

In another context, the Washington Supreme Court has also noted that a legislature may make valid discriminations between breeds in its regulation of dogs. In *McQueen v. Kittitas County*, 115 Wash. 672, 198 Pac. 394 (1921), the court stated:

> "[S]ince dogs are a subject of the police power, we see no reason why the legislature may not make distinctions *between breeds*, sizes, and the localities in which they are kept. The object of the statute is protection. The purpose is to prevent injuries to persons and property by dogs. Any distinction, founded upon reason at least, is therefore valid . . . ." (Emphasis added.) 115 Wash. at 678.

As discussed above, pit bull dogs represent a unique public health hazard not presented by other breeds or mixes of dogs. Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely vicious attacks is coupled with an unpredictable nature. The trial court correctly concluded that the city ordinance did not violate the plaintiffs' equal protection rights.

The final issue raised by plaintiffs is whether the district court erred in dismissing the plaintiffs' claim pursuant to 42 U.S.C. § 1983 (1982). Since the district court correctly concluded that the plaintiffs had not demonstrated that the city ordinance violated their constitutional rights, it did not err in dismissing their § 1983 claim for damages.

The judgment of the district court is affirmed.

APPENDIX II

ORDINANCE NO. DAC-1442

AN ORDINANCE REGULATING ANIMALS IN THE CITY OF OVERLAND PARK, KANSAS; AMENDING AND REPEALING EXISTING OVERLAND PARK MUNICIPAL CODE SECTIONS 6.10.010 6.10.030 AND 6.10.-180; PROVIDING SUBSTITUTE PROVISIONS THEREFOR; PROVIDING FOR THE REGULATION OF DANGEROUS ANIMALS TO INCLUDE PIT BULL DOGS WITHIN THE CORPORATION LIMITS OF THE CITY OF OVERLAND PARK, KANSAS; REPEALING CITY OF OVERLAND PARK ORDINANCE NO. DAC-1426, THE SAME BEING CODIFIED.

WHEREAS, the Governing Body of the City of Overland Park has determined that the keeping of "pit bull dogs" within the corporate City limits poses an immediate threat to the health, safety and welfare of the citizen of Overland Park.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF OVERLAND PARK.

SECTION 1. Overland Park Municipal Code Section 6.10.010 is hereby amended to read as follows:

6.10.010 Definitions

(a) For the purposes of this chapter "dangerous animal" means and includes 1) any mammal, amphibian, reptile or fowl which is of a species which, due to size, vicious nature or other characteristics would constitute a danger to human life, physical well-being, or property, including but not limited to, lions, tigers, leopards, panthers, bears, wolves, apes, gorillas, monkeys of a species whose average adult weight is 20 pounds or more, foxes, elephants, alli-

gators, crocodiles, and snakes which are poisonous or otherwise present a risk of serious physical harm or death to human beings as a result of their nature or physical make-up, including all constrictors.

2) Any dog or cat having a disposition or propensity to attack or bite any person or animal without provocation is hereby defined as a "dangerous animal." For the purposes of this chapter, where the official records of the Chief Animal Control Officer or City Clerk indicate a dog or cat has bitten any person or persons or animal on two or more separate occasions, it shall be prima facie evidence that said dog or cat is a dangerous animal.

3) Any pit bull dog. "Pit bull dog" is defined to mean any and all of the following dogs:

(a) The Staffordshire Bull Terrier breed of dogs;

(b) The American Staffordshire Terrier breed of dogs;

(c) The American Pit Bull Terrier breed of dogs;

(d) The Pit Bull Terrier breed of dogs;

(e) Dogs of mixed breeds or of other breeds than above listed which breeds or mixed breeds are known as pit bulls, pit bull dogs, or pit bull terriers;

(f) Dogs which have the appearance and characteristics of being predominately of the breeds of dogs known as Staffordshire Bull Terrier, American Pit Bull Terrier, American Staffordshire Terrier, Pit Bull Terrier and any other breed of dog commonly known as pit bulls, pit bull dogs, or pit bull terriers, or a combination of those breeds.

The registration of a dog at any time as a pit bull or any of the dogs listed above shall constitute prima

facie evidence the animal is prohibited by this section.

(b) "Person" includes any natural person, association, partnership, organization or corporation.

SECTION 2. Overland Park Municipal Code Section 6.10.030 is hereby amended to read as follows:

6.10.030 Exceptions; Permit and registration requirements.

Any person or organization which falls into one of the following subsections shall be permitted to own, harbor or have charge, custody, control, or possession of any animal described in 6.10.010 hereof, provided he/she has first secured a permit under 6.10.070; provided further that owners, keepers or harborers of "pit bull dogs" shall also be required to register their animals in accordance with the provisions of this ordinance and Chapter 6 of the Overland Park Municipal Code:

(a) The keeping of such animals in zoos, bona fide educational or medical institutions, museums or any other place where they are kept as live specimens for the public to view, or for the purpose of instruction or study.

(b) The keeping of such animals for exhibition to the public of such animals by a circus, carnival or other exhibit or show.

(c) The keeping of such animals in a bona fide, licensed veterinary hospital for treatment.

(d) Commercial establishments possessing such animals for the purpose of sale or display.

(e) The keeping of a registered pit bull as defined in 6.10.010 herein. The keeping of such dogs, however, shall be subject to the following mandatory requirements:

(1) *Leash and Muzzle.* No person shall permit a registered pit bull dog to go outside its kennel or pen unless such dog is securely leashed with a leash no longer than four (4) feet in length. No person shall permit a pit bull dog to be kept on a chain, rope or other type of leash outside its kennel or pen unless a person is in physical control of the leash. Such dogs may not be leashed to inanimate objects such as trees, posts, buildings, etc. In addition, all pit bull dogs on a leash outside the animals kennel must be muzzled by a muzzling device sufficient to prevent such dog from biting persons or other animals.

(2) *Confinement.* All registered pit bull dogs shall be securely confined indoors or in a securely enclosed and locked pen or kennel, except when leashed and muzzled as above provided. Such pen, kennel or structure must have secure sides and a secure top attached to the sides. All structures used to confine registered pit bull dogs must be locked with a key or combination lock when such animals are within the structure. Such structure must have a secure bottom or floor attached to the sides of the pen or the sides of the pen must be embedded in the ground no less than two (2) feet. All structures erected to house pit bull dogs must comply with all zoning and building regulations of the City. All such structures must be adequately lighted and ventilated and kept in a clean and sanitary conditions.

(3) *Confinement Indoors.* No pit bull dog may be kept on a porch, patio or in any part of a house or structure that would allow the dog to exit such building on its own volition. In addition, no such animal may be kept in a house or structure when the windows are open or when screen windows or screen doors are the

only obstacle preventing the dog from exiting the structure.

(4) *Signs.* All owners, keepers or harborers of registered pit bull dogs within the City shall within ten (10) days of the effective date of this ordinance display in a prominent place on their premises a sign easily readible by the public using the words "Beware of Dog." In addition, a similar sign s requred to be posted on the kennel or pen of such animal.

(5) *Insurance.* All owners, keepers or harborers of registered pit bull dogs must within ten (10) days of the effective date of this ordinance provide proof to the City Clerk of public liability insurance in a single incident amount of $50,000.00 for bodily injury to or death of any person or persons or for damage to property owned by any persons which may result from the ownership, keeping or maintenance of such animal. At the time of initial registration the owner, keeper or harborer must present proof to the City Clerk of the required insurance. At the time of subsequent registration the owner, keeper or harborer must show proof of insurance for the present registration period and proof that there was insurance coverage throughout the period of the prior registration year. In the event said liability insurance is cancelled, lapsed, or for any other reason becomes non-enforceable, said owner, keeper, or harborer shall be in violation of the provisions of this ordinance and subject to the penalties provided herein.

(6) *Identification Photographs.* All owners, keepers or harborers of registered pit bull dogs must within ten (10) days of the effective date of this ordinance provide to the City Clerk two color photographs of the registered animal clearly showing the color and approximate size of the animal.

(7) *Reporting Requirements.* All owners, keepers or harborers of registered pit bull dogs must within ten (10) days of the incident, report the following information in writing to the City Clerk as required hereinafter:

(a) The removal from the City or death of a registered pit bull dog;

(b) The birth of offspring of a registered pit bull dog;

(c) The new address of the registered pit bull dog owner should the owner move.

(8) *Animals Born of Registered Dogs.* All offspring born of pit bull dogs registered with the City must be registered with the City within six (6) weeks of the birth of such animal.

(9) *Failure to Comply.* It shall be unlawful for the owner, keeper or harborer of a pit bull dog registered with the City Clerk to fail to comply with the requirements and conditions set forth in this ordinance. Any dog found to be the subject of a violation of this ordinance shall be subject to immediate seizure and impoundment. In addition, failure to comply will result in the revocation of the license of such animal and the permit providing for the keeping of such animal resulting in the immediate removal of the animal from the City.

SECTION 3. Overland Park Municipal Code Section 6.-10.180 is hereby amended to read as follows:

6.10.180 Violations and Penalties.

Any person violating or permitting the violation of any provision of this ordinance shall upon conviction in

the Municipal Court be fined a sum not less than $200 and not more than $1,000. In addition to the fine imposed, the Court may sentence the defendant to imprisonment in the county jail for a period not to exceed 30 days. In addition, the Court shall order the registration of and permit for the subject pit bull revoked and the dog removed from the City. Should the defendant refuse to remove the dog from the City, the municipal court judge shall find the defendant owner in contempt and order the immediate confiscation and impoundment of the animal. Each day that a violation of this ordinance continues shall be deemed a separate offense. In addition to the foregoing penalties, any person who violates this ordinance shall pay all expenses, including shelter, food, handling, veterinary care and testimony necessitated by the enforcement of this ordinance.

SECTION 4. Existing Overland Park Municipal Code Sections 6.10.010, 6.10.030, 6.10.180 and City of Overland Park Ordinance No. DAC-1426 are hereby repealed.

SECTION 5. This ordinance shall take effect and be in force from and after its publication in the *Overland Park Sun*, an official City newspaper.

PASSED by the City Council this 21st day of September, 1987.

APPROVED by the Mayor this 21st day of September, 1987.

(s) Ed Eilert
Ed Eilert, Mayor

ATTEST:

(s) Bernice Crummett
Bernice Crummett
Finance Director/City Clerk

APPROVED AS TO FORM:

(s) Michael R. Santos
Michael R. Santos
Assistant City Attorney

ORDINANCE NO. DAC-1494

AN ORDINANCE RELATING TO DANGEROUS ANIMALS IN THE CITY OF OVERLAND PARK, KANSAS; AMENDING AND REPEALING EXISTING OVERLAND PARK MUNICIPAL CODE SECTION 6.10.010; PROVIDING SUBSTITUTE PROVISIONS THEREFOR.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF OVERLAND PARK, KANSAS:

SECTION 1. Overland Park Municipal Code Section 6.-10.010 is hereby amended to read as follows:

6.10.010 Definitions

(a) For the purposes of this chapter "dangerous animal" means and includes 1) any mammal, amphibian, reptile or fowl which is of a species which, due to size, vicious nature or other characteristics would constitute a danger to human life, physical well-being, or property, including but not limited to, lions, tigers, leopards, panthers, bears, wolves, apes, gorillas, monkeys of a species whose average adult weight is 20 pounds or more, foxes, elephants, alligators, crocodiles, and snakes which are poisonous or otherwise present a risk of serious physical harm or death to human beings as a result of their nature or physical makeup, including all constrictors.

2) Any dog or cat having a disposition or propensity to attack or bite any person or animal without provocation is hereby defined as a "dangerous animal." For the purposes of this chapter, where the official records of the Chief Animal Control Officer or City Clerk indicate a dog or cat has bitten any person or persons or animal on two or more separate occasions, it shall be prima facie evidence that said dog or cat is a dangerous animal.

3) Any pit bull dog. "Pit bull dog" is defined to mean any and all of the following dogs:

(a) The Staffordshire Bull Terrier breed of dogs;

(b) The American Staffordshire Terrier breed of dogs;

(c) The American Pit Bull Terrier breed of dogs;

(d) Dogs which have the appearance and characteristics of being predominately of the breeds of dogs known as Staffordshire Bull Terrier, American Pit Bull Terrier, or American Staffordshire Terrier.

The registration of a dog at any time as a pit bull or any of the dogs listed above shall constitute prima facie evidence the animal is prohibited by this section.

(b) "Person" includes any natural person, association, partnership, organization or corporation.

SECTION 2. Existing Overland Park Municipal Code Section 6.10.010 is hereby repealed.

SECTION 3. This ordinance shall take effect and be in force from and after its publication in the *Overland Park Sun,* an official City newspaper.

PASSED by the City Council this day 7th day of December, 1987.

APPROVED by the Mayor this 7th day of December, 1987.

(s) Ed Eilert
Ed Eilert, Mayor

ATTEST:

(s) Bernice Crummett
Bernice Crummett
Finance Director/City Clerk

APPROVED AS TO FORM:

(s) Michael R. Santos
Michael R. Santos
Assistant City Attorney

APPENDIX III

Identification of "Pit Bull Dogs" Pursuant to O.P.M.C. 6.10.020

The following procedures and standards shall be used by all animal control officers and patrol division officers in determining whether a particular animal is subject to the requirements of *O.P.M.C. 6.10.020.*

1. All officers will initially determine why the animal is being considered for possible inclusion within the requirements of *O.P.M.C. 6.10.020.* Factors to be considered include, but are not limited to the following or a combination of the following:

a. Registration of the animal as a pit bull dog as defined by *O.P.M.C. 6.10.010.*

b. Identification of the animal as a pit bull dog by the owner, keeper, or harborer of the dog.

c. Positive identification of the animal as a pit bull dog by an officer of the department pursuant to the procedures set forth in this S.O.P.

d. Identification by a lay witness who has personal knowledge that the dog is a pit bull. (Examples: Owner has referred to dog as pit bull in witness's presence).

e. Positive identification of dog as pit bull by licensed veterinarian.

2. Positive identification of an animal as a pit bull by an officer shall include any or all of the following:

a. Verification of inclusion by comparison of the physical characteristics of the subject dog with identification photos and physiological diagrams.

b. Personal and professional experience of the officer in having observed pit bull dogs in the past.

c. Identification of animal as a pit bull by owner, keeper, or harborer.

3. If an owner, keeper, or harborer of an animal denies it is subject to the ordinance, an officer shall not consider the animal within the parameters of *O.P.M.C. 6.10.020* unless the following conditions are met.

a. The officer believes the animal is a pit bull after comparing the physical characteristics of the animal with the identification material set forth herein.

b. The officer identification of the animal as a pit bull is verified by an animal control officer or if an animal control officer is not available, by another department officer after comparing the animal to identification materials, provided that any animal identified as a pit bull by a department officer whose owner, keeper, or harborer continues to deny the animal's identification as a pit bull shall be afforded the immediate opportunity to be brought before a licensed veterinarian for identification purposes. The officer shall accept the breed identification of the veterinarian.

4. *O.P.M.C. 6.10.010* requires that all animals subject to the ordinance be at a minimum predominately pit bull. Predominately in this context shall mean that the officer has knowledge through identification procedures, admission by owner, keeper, or harborer, or otherwise that the animal is more than fifty percent pit bull. Predominately shall further mean that the animal exhibits the physical characteristics of a pit bull more than

that of any other breed of dog. If an officer cannot determine the predominate breed of the animal in question as pit bull, the animal shall not be subject to the provisions of *O.P.M.C. 6.10.020* unless the animal is later positively identified as a pit bull by a licensed veterinarian.

5. All officers shall accept the written or oral identification of an animal by a licensed veterinarian unless the officer has reason to question the credentials of the individual rendering the statement. In such cases the matter shall be referred to the Chief Animal Control Officer or the watch commander for further investigation.

6. All animal control officers shall be familiar with and consult the attached breed identification materials. In addition, all animal control officers shall personally review the registration and identification photos of pit bulls presently registered with the City of Overland Park.

APPROVED BY:

/s/ Myron E. Scafe
Myron E. Scafe
Chief of Police